UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

E.W. HOWELL CO., LLC.,

Employer

and Case No. 29-RC-154268

NEW YORK CITY AND VICINITY
DISTRICT COUNCIL OF CARPENTERS,

Petitioner[1]

DECISION AND DIRECTION OF ELECTION

E.W. Howell Co., LLC ("the Employer") is engaged in commercial construction. On June 16, 2015,[2] New York City and Vicinity District Council of Carpenters ("the Petitioner") filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of all full-time and regular part-time carpenter foremen, carpenter general foremen, journeymen, carpenters, journeymen carpenters, and journeymen carpenters apprentices employed by the Employer in New York City.

The Employer asserts that the processing of this petition is not appropriate because the Employer no longer employs any unit employees in New York City and has no plans to hire unit employees.

A hearing was held before Ashok Bokde, a hearing officer of the National Labor Relations Board.

As discussed in more detail below, I find that the Employer has not demonstrated that the unit sought is substantially contracting. I will therefore direct an election in an appropriate unit.

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1 I hereby amend the caption to reflect the parties' full and correct names.

FACTS

The Employer is engaged in commercial general construction. The Employer was a signatory to a collective bargaining agreement between the Building Contractors Association, Inc. ("BCA") and the Union covering all full-time and regular part-time carpenter foreman, carpenter general foreman, journeyman, carpenter, journeymen carpenters, and journeymen carpenter apprentices employed by the Employer in New York City. On April 15, the Employer sent notice to the Union that the Employer was terminating its collective bargaining agreement with the Union on June 30, the expiration of the contract.

Paul O'Rourke, the Employer's Executive Vice President, testified that the Employer does not regularly have enough carpentry work to continue to employ unit employees. The Employer found it was paying unit employees for a full day of work when the Employer had work requiring only a portion of that time. The Employer determined that it would be more cost effective to subcontract its carpentry work. This decision was made by the Employer's executive committee, which includes the Employer's president, controller, O'Rourke and another executive vice president, project executives, and other unidentified individuals. The executive committee makes planning decisions for the Employer, such as what the company needs to do to be profitable. The Employer did not keep minutes of the executive committee's meetings. O'Rourke initially testified that he had looked at the company's numbers to determine that it was more profitable to subcontract unit work. On cross-examination, he testified that he was not aware of any financial analysis done in writing in this regard.

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2 All dates hereinafter are in 2015 unless otherwise indicated.

O'Rourke also testified that the Employer has made similar changes in the past. For example, the Employer used to have a collective bargaining agreement with the bricklayers union, but over time it became more profitable to subcontract the bricklayers work.

O'Rourke testified that the Employer has historically employed unit employees. Most recently, the Employer has employed three individuals in unit positions, Eugeniusz Gradzki, Ragip Sabovic, and John Donnellan. According to O'Rourke, the Employer laid off all three unit employees in June. The Employer helped two of them, Gradzki and Sabovic, secure work with JMR Concrete, a subcontractor the Employer employs.

O'Rourke testified that the Employer has several ongoing jobs in New York City, including the Peck Slip School (P.S. 343), P.S. 339, the Museum of the City of New York, ABC TV Studios, and the Hewitt School. The Union presented evidence that the Employer has regularly employed unit employees on these jobs, as well as other jobs located in New York City until the day before the hearing. The Employer employed Gradzki at the Museum of the City of New York on June 21, 22 and 23. The Employer employed Sabovic at P.S. 339 on June 21 and 22. The Employer employed Donnellan at the Hewitt School on June 21 and 22.[3]

DISCUSSION

The issue in this case is whether it is appropriate to proceed to an election when the Employer claims to have laid off all unit employees and does not intend to hire additional unit employees. The Board finds a petition untimely when an imminent and certain contraction of the petitioned-for bargaining unit renders the current complement of employees unrepresentative of

[3] O'Rourke initially testified that Gradzki and Sabovic were laid off on June 16 and that Donnellan was laid off on June 22. Upon evidence introduced by the Union that Gradzki and Sabovic had reported working for the Employer after June 16, O'Rourke testified that these employees had been laid off on June 23, the day before the hearing.

the ultimate complement, both in number of employees and in the types of classifications. See Hughes Aircraft Co., 308 NLRB 82, 83 (1992) (in which the Board held that "it will not conduct an election at a time when a permanent layoff is imminent and certain."); see also Martin Marietta Aluminum, 214 NLRB 646 (1974) (in which the Board dismissed a petition where a substantial number of employees had been terminated and the closure of the employer's plant was "imminent and definite"); Douglas Motors Corp., 127 NLRB 307, 308 (1960) (in which the Board found that in order to process a petition, the present work complement must be "substantial and representative of the ultimate complement as projected both as to the number of employees and the number and kind of job classification").

The Board considers several factors in contracting unit cases, including (1) whether the contraction is definite and imminent, or merely speculative, (2) whether the contraction is a result of a "fundamental change" in the nature of the Employer's business, (3) and whether a "substantial and representative complement" of employees will remain after the contraction, specifically, at least 30% of the current complement in at least 50% of the classifications. See MJM Studios of New York, Inc., 336 NLRB 1255, 1256 (2001); Douglas Motors Corp., supra, 127 NLRB at 308 (the Board will consider whether a reduction in the size of the unit is a result of a "fundamental change in the nature of the Employer's business operations."). A mere reduction in the number of employees does not warrant dismissing a petition. MJM Studios of New York, Inc., supra, 336 NLRB at 1256.

Particularly in the construction industry, where projects continually begin and end, and where the units continually expand and contract, the Board is reluctant to dismiss a petition unless there will be an almost complete cessation of the employer's construction work in the foreseeable future. For example, in Fish Engineering & Construction Partners Ltd., 308 NLRB

836 (1992), the Board directed an election, even though the employer's two current projects were expected to finish shortly after the hearing, and the employer had no definite work lined up thereafter. The Board noted that the employer had performed a total of four jobs in the geographical area in recent years, and had also submitted a bid for future work in the area.

Similarly, in Brown & Root, Inc., 314 NLRB 19 (1994), the company employed 600 employees at three construction sites in West Virginia when the petition was filed. The employer claimed that all "major construction" at the three sites would be completed within 30 to 45 days, and that it would retain a small group of employees to perform only "minor capital construction work" and supplemental maintenance for another 60 to 90 days. In directing an election, the Board noted that the employer continued to perform construction work (including the "minor capital construction") at various sites. There was no evidence that the employer's construction work would completely cease or become de minimis, or that the employer would discontinue its practice of accepting contracting work in the future. Brown & Root, 314 NLRB at 28. These cases demonstrate that periodic contractions and expansions are typical of construction industry work do not constitute evidence of imminent and definite unit contraction, even in cases where employers have established plans to lay off unit employees. Compare Davey McCee Corp., 308 NLRB 839 (1992) (in which the Board dismissed a petition when the employer's entire operation in the geographical area would cease within a month of the hearing, all employees would be terminated, and the employer had no other jobs underway or even under bid in the geographical area); M.B. Kahn Construction Co., 210 NLRB 1050 (1974) (in which the Board dismissed a petition upon a finding that contraction of the petitioned for unit was imminent due to the completion of a major construction project and a showing that the employer did not have additional work in the same geographic area).

In the present case, the Employer has not adequately demonstrated that contraction of the petitioned-for unit is imminent and definite. The Employer has not presented evidence that its projects or the nature of the work it performs is changing. To the contrary, the Employer has several ongoing construction jobs in New York City, including the Peck Slip School (P.S. 343), P.S. 339, the Museum of the City of New York, ABC TV Studios, and the Hewitt School. Unit employees performed work on these projects as recently as the day before the hearing. There is no evidence that the Employer will cease operations in this geographic area. See Fish Engineering & Construction Partners Ltd., supra; Brown & Root, supra.

In addition, although O'Rourke initially testified that he reviewed the Employer's numbers in making the decision to subcontract unit work, he later conceded that he did not know of any written financial analysis in this regard. The Employer could not produce any other documentation to support its position, such a executive committee meeting minutes or any written business plan.

Given the nature of the construction industry, the ongoing projects of the Employer, and the lack of clear evidence that the Employer will cease operations or that the Employer's construction work will become de minimus, I find that it is appropriate to hold an election in this case.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, the undersigned finds and concludes as follows:

1. I find that the rulings made by the Hearing Officer at the hearing are free from prejudicial error and hereby are affirmed.

2. The record indicates that E.W. Howell Co. LLC. is a domestic corporation, with its principal office and place of business located at 245 Mutton Road, Suite 600, Plainview, New York. The parties stipulated that the Employer is engaged in the construction business. During the past year, which period represents its annual operations generally, the Employer purchased and received goods valued in excess of $50,000 directly from sources outside the State of New York.

Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. It will therefore effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I hereby find, that New York City and Vicinity District Council of Carpenters is a labor organization as defined in Section 2(5) of the Act. It claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. I find that the following employees constitute a unit appropriate for the purposes of collective bargaining:

> All full-time and regular part-time[4] carpenter foreman, carpenter general foreman, journeyman, carpenter, journeymen carpenters, and journeymen carpenter apprentices employed by the Employer in New York City, but excluding all other employees, guards, and supervisors as defined by Section 2(11) of the Act.

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4 In addition to those eligible to vote under the Board's standard criteria, unit employees are eligible to vote if they have been employed for 30 days or more within the 12 months preceding the eligibility date, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24 month period immediately preceding the eligibility date. Employees who have been terminated for cause or quit voluntarily prior

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by New York City and Vicinity District Council of Carpenters.

A. Election Details

The election will be held by mail ballot commencing on July 20, 2015. The count will be held at 10 a.m. on August 6, 2015 at the Region 29 Office located at 2 Metrotech Center, 5th Floor, Brooklyn, New York. In order to be valid and counted, the returned ballots must be received in the Region 29 office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **July 7, 2015**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well

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to completion of the last job for which they were employed would not be eligible under this formula. Steiny & Co., 308 NLRB 1323 (1992); Daniel Construction, 133 NLRB 264 (1961), as modified167 NLRB 1078 (1967).

as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by July 10, 2015. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be

used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties name in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to

12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: July 8, 2015

____/s/ James G. Paulsen_____
James G. Paulsen
Regional Director, Region 29
National Labor Relations Board
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Brooklyn, New York 11201